AD-A097 301 NAVAL POSTGRADUATE SCHOOL MONTEREY CA F/G 5/4
PROFESSIONAL LIABILITY OF MILITARY ENGINEERS.(U)
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SECURITY CLASSIFICATION OF THIS PAGE (When Data Entered)

LEVEL 1

2

REPORT DOCUMENTATION PAGE	READ INSTRUCTIONS BEFORE COMPLETING FORM
1. REPORT NUMBER	2. GOVT ACCESSION NO. AD A097301	3. RECIPIENT'S CATALOG NUMBER
4. TITLE (and Subtitle) Professional Liability of Military Engineers	5. TYPE OF REPORT & PERIOD COVERED MASTER'S THESIS
	6. PERFORMING ORG. REPORT NUMBER
7. AUTHOR(s) Hein, Gary W.	8. CONTRACT OR GRANT NUMBER(s)
9. PERFORMING ORGANIZATION NAME AND ADDRESS Texas A&M University	10. PROGRAM ELEMENT, PROJECT, TASK AREA & WORK UNIT NUMBERS
11. CONTROLLING OFFICE NAME AND ADDRESS CODE 031 NAVAL POSTGRADUATE SCHOOL MONTEREY, CALIFORNIA 93940	12. REPORT DATE April 1980
	13. NUMBER OF PAGES 22
14. MONITORING AGENCY NAME & ADDRESS(if different from Controlling Office)	15. SECURITY CLASS. (of this report) UNCLASS
	15a. DECLASSIFICATION/DOWNGRADING SCHEDULE

16. DISTRIBUTION STATEMENT (of this Report)

APPROVED FOR PUBLIC RELEASE; DISTRIBUTION UNLIMITED

17. DISTRIBUTION STATEMENT (of the abstract entered in Block 20, if different from Report)

18. SUPPLEMENTARY NOTES

19. KEY WORDS (Continue on reverse side if necessary and identify by block number)

Federal Tort Claims Act, Professional Liability, Civil Engineering, Military Law

20. ABSTRACT (Continue on reverse side if necessary and identify by block number)

SEE REVERSE

DTIC ELECTE APR 3 1981 S D

DD FORM 1473 (Page 1) EDITION OF 1 NOV 68 IS OBSOLETE S/N 0102-014-6601

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SECURITY CLASSIFICATION OF THIS PAGE (When Data Entered)

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ABSTRACT

Professional liability is a subject of recent concern to most architects and engineers. The purpose of this paper is to trace the developments in this field from ancient times through the Federal Tort Claims Act, to the present. Professional liability will be presented from the standpoint of military architects and engineers; both United States Armed Forces personnel and United States Civil Service personnel working for the military. Liable actions and defenses will be discussed, and recommendations made which will hopefully improve the situation.

PROFESSIONAL LIABILITY
OF
MILITARY ENGINEERS.

An Engineering Report

by

GARY WAYNE HEIN

Submitted to Committee Members
M.D. Jones (CE) Chairman
Donald L. Woods (CE)
A.W. Smith (MGMT)
Texas A&M University
in partial fulfillment of the requirement for the degree of

MASTER OF ENGINEERING

Apr[redacted]980

Major Subject: Civil Engineering

ACKNOWLEDGMENTS

The assistance of Mr. J. Lankhorst, Acting Chief Counsel, Department of the Army, Office of the Chief of Engineers, and especially the assistance of Captain M. P. Nerseth, Judge Advocate General Corps, U.S. Navy, Deputy Assistant Judge Advocate General (Claims), Department of the Navy, Office of the Judge Advocate General are gratefully acknowledged.

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INTRODUCTION

Professional liability is a subject of recent concern to most architects and engineers. With the erosion in the United States courts of various traditional immunities afforded architects and engineers, especially those in government positions, professional liability is indeed important. The purpose of this paper is to trace the developments in this field from ancient times through the Federal Tort Claims Act, to the present. Professional liability will be presented from the standpoint of military architects and engineers; both United States Armed Forces personnel and United States Civil Service personnel working for the military. Liable actions and defenses will be discussed, and recommendations made which will hopefully improve the situation.

HISTORY

The liability of architects and engineers goes back to the ancient Babylonian Empire which employed the Code of Hammurabi, i.e. a house carelessly built which causes the death of the owner requires the death of the designer-builder. This concept continued through the Roman Empire until the English rule of no liability emerged. The British claimed architects and engineers performed only ministerial duties; that is, they acted as agents for the owner and the contractor, obeyed orders and performed duties in which they were left no choice of their own.(9) Thus, at the turn of the century, American law following British law, architects and engineers were only liable for a preponderance of proof for fraudulant acts or collusion.(6) Futhermore, architects and engineers were considered professionals and were exempt from tort liability in English common law due to their respective high status. In addition, architects and engineers have in the past been protected from third party suits in tort by the doctrine of privity. This goes back again to the

ancient Code of Hammurabi which applied only to the owner and the designer-builder. Courts usually held that damages for negligence did not extend to those not party to contractural agreements.(2) Again, based on the English common law that "the King can do no wrong," the United States claimed sovereign immunity. It was a contradiction of sovereignty to allow suits against the King in his own court. Sovereign immunity has been adopted by most states as well.

> "Although a variety of arguments have been advanced for immunizing the government from suit without its consent, the doctrine of sovereign immunity has been justified on the practical ground that satisfying private claims against the state would cause an intolerable drain on public funds and interfere with the effective functioning of government. However, recent reflection has led to the view that such fears are exaggerated and that in any event asking innocent victims to bear alone the losses inflicted upon them through governmental activity is fundamentally unfair. Today, the cost of compensating for many such losses is regarded as an ordinary expense of government to be borne indirectly by all who benefit from the services that the government provides."(1)

The doctrine of sovereign immunity has been employed as recently as 1963 in the United States Supreme Court case of Dugan v. Rank. This was an injunction suit by water rights claimants against the United States and local officials of the United States Bureau of Reclamation. The Supreme Court ruled the United States had not consented to be sued, therefore the case was beyond jurisdiction of the courts and must be dismissed. Also, the suit against the local officials of the Reclamation Board was in fact against the United States and must therefore be dismissed.(3) This is one example of immunity being extended to relatively low level government officials. Although this immunity did not normally extend to government employees, it has been used to prevent suits against high government officials such as Congressmen, judges, cabinet members, etc. Lower government employees were liable for their own acts unless prohibited by law, while the Government was not. Therefore, the victim of tortious conduct, usually negligence, could only sue the actual

tortfeasor who may be judgement proof or gain relief through a private bill.

In 1821, Chief Justice John Marshall stated the United States could not be sued without its consent. Special legislation by Congress began to allow suits on certain claims. This procedure was replaced in 1855 when the Court of Claims was established. Initially an advisory court to Congress, the Court of Claims was given power to render judgements in 1863. Until 1868, however, the Government retained its immunity from all tort liability. Although some plaintiffs were able to get relief for claims through private bills in Congress, the majority of tort claims remained without remedy. Because of the unfairness to plaintiffs and due to the heavy burden put on Congress by many private claim relief bills, Congress passed the Federal Tort Claims Act (FTCA) in 1946.(8) The stated purpose of the FTCA was to "provide a judicial forum for the claims of private persons wronged by the tortious activities of government employees and to relieve Congress of the need to consider a large number of private relief bills each year."(7)

THE FEDERAL TORT CLAIMS ACT

The FTCA gives federal district courts jurisdiction. In the FTCA the United States waives its immunity to tort actions as stated in 28 U.S.C.A. Section 2674, Liability of the United States. "The United States shall be liable, respecting the provisions of this title relating to tort claims in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgement or for punitive damages."(11) Naturally, there are several exceptions. The most important is the discretionary function exception which excludes claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the

Government, whether or not the discretion involved be abused."(1) Various other exceptions apply to government activities such as mail, customs, quarantines, fiscal operations, combatant acitivities of the military, law enforcement actions, etc.

There has been a substantial amount of litigation under the FTCA, most of it dealing with exceptions. The discretionary function exception has definitely been the most lively provision of the FTCA. The most important case in this regard is Dalehite v. United States (1953). This was a case in which two shiploads of ammonium nitrate, intended for fertilizer, exploded in the harbor at Texas City, Texas destroying a large part of the city. The trial court found that government officials were negligent in adopting the post-war program for export of fertilizer; in controlling the manufacture, handling and shipping, and in policing the loading operations. This was reversed in the Court of Appeals and affirmed by the Supreme Court of the United States. They held the decisions which were negligent were made at the planning or policy level and therefore fall under the discretionary function exception. Also, the failure of the Coast Guard to fight the resulting fire was dismissed because there was no similar liability for private persons. Since the FTCA requires a negligent act, the United States is relieved of strict liability in cases such as Dalehite v. United States. Subsequent decisions have supported this holding that there is no strict tort liability under the FTCA.(8)

Through statutes and the legislative history of the FTCA, government employees and officers are generally no longer subject to tort actions where the United States has waived its immunity. The reasons are: 1. The United States is financially solvent, therefore plaintiffs invariably sue the United States. This also bars further action against the government employee. 2. In motor vehicle accidents and medical malpractice, remedy against the United

States is exclusive of any action against the employee. 3. The Supreme Court has held the Government does not have the right of indemnity against negligent employees whose negligence has caused the United States to be financially liable. However, negligent misrepresentation is excluded from the FTCA. Therefore, "government professionals are still likely to be sued personally for the type of tort which they are most likely to commit, the tort of negligent misrepresentation."(5)

Under the FTCA, government officials performing discretionary or quasi-judicial functions as distinguished from ministerial tasks are not liable for negligence. If officials were not afforded this immunity within their scope of authority, it would be extremely difficult to find public servants. The case of Barr v. Matteo (1959) illustrates this point. In this case an action was brought against William G. Barr, acting director of the Office of Rent Stabilization, by two employees, Linda A. Matteo and John J. Madigan, for damages for libel based on a press release in which the director announced his intention to suspend them for conduct for which the agency had been criticized. The petitioner defended among other things that he was protected by qualified or absolute privilege. The United States District Court found for the respondent. The petitioner appealed only on the issue of absolute privilege and the Court of Appeals affirmed the lower court's decision saying the director was entirely outside his line of duty. The Supreme Court remanded with directions to pass upon the petitioner's claim of qualified privilege. On remand, the Court of Appeals held that the press release was protected by qualified privilege but there was evidence the director had acted maliciously or had spoken with lack of reasonable grounds for believing his statement was true and that either conclusion defeated the qualified privilege defense. The Court of Appeals then remanded the case to the District Court for retrial. The petitioner

again sought and the Supreme Court granted certiorari (appeal) to decide whether the claim of absolute privilege should have stood as a bar to maintain the suit despite the allegations of malice. In making their decision, the Supreme Court stated it was important that government officials be free to exercise their duties without fear of damage suits. They held the press release issued by the director was within the scope of his duties and was an appropriate exercise of discretion which an officer of that rank must possess if the public service is to function properly. The Supreme Court, realizing there may be cases of actual injustice which will go unredressed, stated that the price was a necessary one to pay for the greater good.

LIABLE ACTIONS

An architect or engineer is liable to the owner for damages resulting from his negligence or fraud. They are judged by whether they have exercised reasonable skill, care and diligence expected of members of their profession. However, an architect or engineer does not normally guarantee against defects in his services but only to exercise ordinary care and skill. Architects and engineers can be liable for defects resulting from poor design, poor supervision, or for delays in furnishing plans (breach of contract). They may also be held liable for negligently issuing certificates of performance or completion. Acceptance of work by the owner does not necessarily prevent the owner from claiming damages for negligence by the architect or engineer. Architects and engineers are liable for misrepresentation, breach of warranty, or fraud. They may also be liable to a bonding company for issuing unjustified certificates of payment.(10)

Most claims against design professionals are for professional negligence, that is, failure to design using due care and skill to avoid injury to others.

But they may also be liable for tresspass, nuisance, libel and slander.

UNITED STATES MILITARY AND UNITED STATES CIVIL SERVANTS

Applying the FTCA to the United States military and United States Civil Service architects and engineers working for the military, we must first deal with the following definitions as stated in 28 U.S.C.A. Section 2671. Employee of the government - includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation. Acting within the scope of his office or employment - in the case of a member of the military or naval forces of the United States, means acting in the line of duty.(11)

Probably the United States military organization which first comes to mind when considering tort liability and negligence from an architectural or engineering standpoint is the United States Army Corps of Engineers. This is because they have the greatest interface with the general public through their regulatory functions under the Rivers and Harbors Act, the Federal Water Pollution Control Act, the National Envrionmental Policy Act, and their many public works projects throughout the United States. In fact, in issuing permits, they have recently been given the responsibility of preserving environmental values and applying a "public interest" test to all requests. The other two major services also have their engineering branches; the Air Force Civil Engineering Officers and the Navy Civil Engineer Corps.

Naturally, any military personnel or civil service architects and engineers are protected against liability for discretionary functions under the FTCA. However, they may be liable for ministerial functions. Although most

actions for professional negligence would be brought against the United States for the reasons previously stated, several actions have been brought against individual District Engineers of the Army Corps of Engineers. These are mostly actions over permits issued by the Corps of Engineers. For example, in Zabel v. Tabb a land developer sued the District Engineer for failure to issue a permit for a filling operation.(3) The point to be made here is that these suits are considered to be against the United States with the Department of Justice defending. The same would hold true if one were being sued for professional negligence.

Of course, the United States military must also consider the Uniform Code of Military Justice in the performance of their duties. Although they may be protected by the FTCA, Article 92 of the Uniform Code of Military Justice (10 U.S.C. Section 892) provides in part that any person subject to the Code who is derelict in the performance of his duties shall be punishable as a court-martial may direct. This includes dereliction of professional duties, such as engineering, as well as military duties.

Some scenarios involving military or civil servants which may have adverse environmental impact are collusion on a permitting action, negligence in preparing a false or misrepresented environmental impact statement for a major federal action, or collusion under the Federal Water Pollution Control Act or the Clean Air Act in enforcement of water or air quality standards. Many situations are possible, all of which could cause injury to someone and thus be subject to tort liability. It should be kept in mind that many of the acts or omissions which may give rise to professional liability on the part of an architect or engineer are classified as torts. Also the general rule is that the law of the state where the incident occured would apply and these laws vary significantly.

TRENDS

Developments in tort law and in the construction industry have resulted in architects and engineers being much more susceptible to liability litigation than previously. Several reasons for this situation follow. 1. The disappearance of the model architect makes it difficult to develop a standard by which to judge reasonable care and skill. Architects and engineers have diversified into design, construction management, inspection, supervision and contract preparation to name a few. 2. Architectural functions are now performed by many organizations which neither deserve the protection nor the burden of professional standards. 3. The privity limitation on the scope of professional liability is increasingly being eroded. 4. The scope of professional liability is expending as the class of professions expands. 5. Judicial distinctions between "discretionary" and "ministerial" acts and acts "in excess" of the scope of the general subject matter over which the officer has authority, have served to dilute the official immunity doctrine. 6. A new limit of "foreseen reliance" is emerging. 7. Statutes of limitations are being interpreted in favor of the injured party. 8. The trend in personal injury law is toward liability without showing fault or negligence. 9. The acceptance doctrine is weakening. 10. The Occupational Safety and Health Act (OSHA) of 1970 has raised questions of standards for negligence. 11. Liability insurance has had an effect on litigation. 12. Strict liability has been invoked in some cases.

Let's look at each of these developments individually. Reasonability is subject to much interpretation in the courts. What constitutes reasonable care and skill is very difficult to define. Also the fact that architects and engineers are now so diversified makes development of a standard even more difficult. For example, an architect-engineer firm would most likely be

involved in the following undertakings on a major project.

"1. Participating in necessary conferences and preliminary studies.
2. Interpreting physical restrictions as to the use of the land.
3. Examining the site of the construction.
4. Preparing and/or interpreting soil, subsoil, and hydrologic data.
5. Preparing drawings or verifying and interpreting existing drawings of existing facilities or construction.
6. Assisting in procuring of financing for the project.
7. Assisting in presentation of a project before bodies possessing approval-disapproval power.
8. Preparing drawings and specifications for architectural, structural, plumbing, heating, electrical, and other mechanical work.
9. Assisting in the drafting of forms of proposals and contracts.
10. Preparing cost estimates and controls.
11. Obtaining bids from contractors.
12. Letting contracts with owner's written approval.
13. Inspecting the contractor's work on a regular basis, including the checking of shop drawings.
14. Interpreting for the contractor the meaning of the drawings and specifications.
15. Ordering the correction or removal of all work and materials not in strict compliance with specifications.
16. Keeping accurate books and records.
17. Preparing as-built drawings which show construction changes and final locations of mechanical and electrical lines.
18. Issuing certificates of payment."(2)

Military and United States civil servants perform all of these functions as well for armed forces projects.

Architectural functions are being performed by construction management firms, consultants, computer firms, and many other nontraditional organizations. Should a professional standard apply in this case? The courts must analyze each case separately to decide which theories of liability apply.

Lack of privity between the professional and the injured party used to be a legal defense. However, recently this defense has weakened to the point where in injury cases it is not an adequate defense. It only provides protection in purely economic rather than personal losses.(10) This leaves the door wide open to third party suits.

> "The privity limitation on the scope of professional negligence is increasingly being eroded - A recognition that the limits of privity do not correspond to the actual limits of society's reliance upon the

professional and the need to remedy the harm that professional negligence can cause. In its place should be the same limit of liability that governs other areas of negligence law; no sound reason exists for discriminating against the victims of professional negligence."(4)

The status of the professional negligence field will change in the future.

"—because the very concept of professional is an historical one, the class of professions is subject to continuing expansion, as more occupations seek the prestige associated with professional status. Doubtless this expansion will alter the concept, and focus greater attention on the legal consequences of achieving professional status. At the same time, the increasing complexity of the subject matter a professional deals with will exacerbate already existing proof problems in malpractice litigation."(4)

It is necessary to recognize the changes that have occured since 1946 in actions involving the discretionary exception. In general, immune official discretion has been diluted since the passage of the FTCA. In differentiating between ministerial and discretionary actions, federal courts possess jurisdiction to hear mandamus action suits applied to ministerial duties; thus compelling action by government officials. The Supreme Court defined the prerequisites for mandamus as; (a) a clear right to relief by the plaintiff, (b) a clear duty by the defendant to provide relief, (c) no other adequate remedy. State and municipal governments began to allow suit in tort, following the federal government. However, municipal governments turned to distinctions based on governmental or proprietary functions. Initially, there is a willingness by the courts to recognize the imprecise definition of the term discretionary. They sought to narrow its meaning to; (a) matters involving government policy, (b) require the discretionary decision be made prior to the action causing damages, and (c) abuses of discretionary immunity would give rise to liability. Concerning public officials, large portions of individual officer's liability have been federalized under the Civil Rights Act of 1961, thus providing a federal remedy in many instances and also providing for public officer accountability. The ability to sue governmental entities has

diminished the need to sue individual officers in tort actions. In fact, the individual may be immune. Another approach is to indemnify the individual through public funds or insurance. Generally, "the trend in recent decades has been to recognize and correct the deleterious effects of recovery against individual government officials."(12) Some lower officials have been given a qualified immunity which protects them from liability upon a showing of good faith and reasonableness. Recent judicial decisions indicate federal courts are less likely to accept a "discretionary function" defense uncritically. Typical tests which have evolved in deciding discretionary function cases are: (a) harm to the plaintiff, (b) existence of alternate remedies, (c) rank of the decision maker, (d) monetary cost to the government, (e) compliance with statutes or regulations, (f) ability of courts to evaluate the issues, (g) importance to the public of the function involved, (h) the extent to which government liability might impair free exercise of the function, and (i) judicial interference with coordinate branches of government. Courts seek to avoid interference based on the intrinsic belief that certain decisions should not be reviewed by the judiciary because they are governmental decisions such as fund availability, public acceptance, and order of priority. Courts are more willing to reject claims of protected discretionary activity and display a sensitivity to problems of unchecked discretion. The discretionary function exception will remain to protect policy making. However, more restrained use will aid individuals in gaining compensation and allow greater judicial review of government action.(12)

The foreseeability of injury depending on the reasonableness of the plaintiff's reliance on the architect's or engineer's performance is becoming part of the tort analysis conducted by the courts. Emphasis is being put on the foreseeable use of the building and people or property which might be

injured through its use. A professional's "failure to exercise the ordinary skill of his profession may expose him to damage claims brought by third persons where there is a direct causal connection between the negligent performance or nonperformance of duty (be it planning or supervisory in nature) and the foreseeable harm suffered by the plaintiff."(2)

As late as 1972, Washington, D.C. still had no limit barring suits arising out of defects in improvements to real property. In addition, where statutes of limitations do exist, the general rule has been the date of error or omission began the limitation time period – "the negligence rule". However, many courts have chosen to apply "the discovery rule" and began the limitation time period when the defect is discovered.(6)

The trend in personal injury law is toward strict liability, requiring no showing of fault or negligence. This implies the doctrine of res ipsa loquitor – "the thing speaks for itself", a rebuttable presumption that a person is negligent if the thing causing an accident was in his or her control only and that type of accident does not usually happen without negligence. Under this theory, the Government could be sued under the FTCA without proof of the negligence of a specific employee. The requirements are: 1. The thing causing injury was under a government employee's control. 2. The employee was acting within the scope of his office or employment (in the line of duty in the case of the military). 3. The accident normally does not occur without negligence.

In the past if an injury occured after acceptance of the project by the owner, architects and engineers had a defense based on the acceptance doctrine. That is, the acceptance by the owner was an intervening action which relieved the contractor and the architect and/or the engineer from all liability. This defense has weakened substantially to the point where it is

likely to be of little if any future protection.(10)

The Occupational Safety and Health Act (OSHA) was signed in 1970. Plaintiffs began to claim OSHA established new standards to determine defendant negligence, while in fact OSHA specifically disclaims the creation of any new legal rights or remedies. Fortunately, the courts have held what is believed to be the Congressional intent of OSHA, that an OSHA violation alone does not create a basis for cause of action in private civil litigation. Although, as of 1976, there had not been court cases involving the issue whether or not a violation of OSHA standards could be used as evidence of negligence per se, if a statute has been violated, this is a distinct possibility.

Municipalities first began to carry liability insurance because of their proprietary liability. Some states eventually followed. There must be statutory authority to purchase the insurance and usually government immunity is waived to the extent of the coverage or authorization is provided for direct action against the insurer. The plaintiff's recovery in this case depends on the statutory authorization. Many professionals are also taking out personal malpractice insurance. Naturally, this has the effect of increasing the likelihood of suit since the plaintiff is more likely to sue if an insurance company is the ultimate source of funds. Possibly requiring insurance to practice and placing the burden on the entire profession through insurance rates is the best alternative to the current ineffective tort liability system.(9)

Common law remedies such as trespass, nuisance, and negligence are no longer adequate for modern day remedies in some instances; for example, oil pollution. Therefore, the Trans-Alaska Pipeline Authorization Act holds owners of pipeline right-of-way in strict liability for all injuries and damages. More of this type of legislative and judicial treatment is sure to

follow.

DEFENSES

Lack of privity and acceptance doctrines have little value in injury cases although they may still be employed where losses are purely economic. In a negligence action the plaintiff must show the defendant's negligence caused the plaintiff's injury or loss. A lack of causation defense on the part of the architect or engineer has not been very successful due to the overall power and control he has over the project.

Statutes of limitations afford some protection. However, courts have often held the time limit begins after discovery of the negligent act causing the injury or loss instead of at the completion of the contract. The principal legal protection is indemnification. Architects and engineers often have a claim against the contractor or anyone whose negligence was greater based on express contractual or quasi-contractual indemnification. Indemnification is an integral part of most contracts and includes only claims relating to personal harm and tangible property and not for economic losses or physical harm to the project itself. If the architect's or engineer's negligence is the primary cause of injury or damage, indemnity will be denied against the contractor. The use of disclaimers in contracts can also help minimize liability.(10) Various statutes usually prohibit indemnity of the Government from an employee and occasionally require the Government to indemnify the employee.

Many situations can still be properly defensed using discretionary immunity applied to "governmental" functions. Contributory negligence and assumption of risk and lack of proximate cause have frequently been used as defenses.(2)

RECOMMENDATIONS

There are several actions that can be taken by professional architects and engineers aimed at reducing professional liability.

1. Professionals wishing to diversify should adequately prepare themselves; for example, an architect wishing to supervise construction.

2. Responsibilities should be distinct and separated. A good example is the Navy Civil Engineer Corps contracting with civilian firms to provide plans and specifications, then using its own highly professional staff to supervise construction completely independent of the design firm.

3. Architects and engineers should either receive legal training or retain legal assistance to avoid litigation.

4. Professionals should perform in accordance with contract requirements, (reasonableness considered).

5. Professional liability insurance is a good idea unless protected otherwise.

6. Careful record keeping in relation to services performed can be invaluable in litigation.(10)

7. An architect who is not an engineer should retain a competent engineer to examine important engineering features during construction.

8. The contract should require the contractor to obtain approval from the architect or engineer for any structural changes.

9. Structural safety is important. Economy must be balanced with good conservative judgement.

10. Contracts should be carefully, clearly prepared so that all required features are provided for and mutually understood by all parties. Avoid statements implying perfection or completeness in every detail. Do not include any supervision provision unless it is meant to be part of the contract and

will result in part of the fees collected for performing the work.

11. To decrease liability, the architect or engineer should have no financial interest in the project.

12. Ensure a safe adequate design using reliable, suitable products.(2)

CONCLUSION

Professional liability for all architects and engineers is constantly increasing. Much of what has been presented here concerning these two professions can generally be applied to United States military and civil service employees as well. As the public demands accountability of government employees, and the judiciary responds to those demands, traditional defenses and immunities are diminishing. It is advantageous for professionals to become familiar with the legal limitations of their respective positions in order to curb this trend of increasing vulnerability for their actions. It would also help to keep in mind those things which can be actively pursued in daily business to further prevent potential liability.

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